

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 713 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

=====

1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes.

2. To be referred to the Reporter or not? No. @@
o be referred to the Reporter or not? No. @@ To be referred
o the Reporter or not? No. @@ To be referred to the Reporter
or not? No. @@ To be referred to the Reporter or not? N
. @@ To be referred to the Reporter or not? No.
@ To be referred to the Reporter or not? No. @@ To be refer
ed to the Reporter or not? No. @@ To be referred to the Repo
ter or not? No. @@ To be referred to the Reporter or not?
No. @@ To be referred to the Reporter or not? No.
@@ To be referred to the Reporter or not? No. @@ To be r
ferred to the Reporter or not? No. @@ To be referred to the
eporter or not? No. @@ To be referred to the Reporter or not
No. @@ To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy
of the judgement? No.

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?
No.

PRAVIN RAMNBHAI NAI

Versus

STATE OF GUJARAT

Appearance:

MR JM PANCHAL for the appellant .
MR MA BUKHARI, APP, for the respondent.

CORAM : MR.JUSTICE K.R.VYAS and

MR.JUSTICE A.M.KAPADIA

Date of decision: 23/02/99

ORAL JUDGEMENT

PER: K.R.VYAS,J.

Appellant Pravin Ramanbhai Nai has challenged by way of this appeal the judgment and order of conviction and sentence dated 23-8-91 passed by the learned Additional Sessions Judge , Ahmedabad (Rural) in Sessions Case No. 92/90 convicting him for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life and to pay a fine of Rs.1000/- in default to undergo S.I. for six months.

The appellant is the barber of Shivam Hair Art in Sector No.29 at Gandhinagar. The incident took place on 3-5-90 at about 7.00 p.m. when deceased Nareshkumar Jivabhai in company with complainant Jayeshbhai Bhikhabhai (PW 1) came to the shop of the appellant and were sitting on a bench kept outside the shop and waiting for their turn to come. It appears that on the earlier occasion the deceased was not satisfied with the hair-cutting done by the appellant and, therefore, the deceased in usual terms made a grievance to the appellant. It appears that the talk on this trifling issue resulted into exchange of verbal altercations between the appellant and the deceased. Not only that it had further led in grappling and scuffle between them and finally ended when the appellant pierced scissor in the chest of the deceased. The deceased fell down and became unconscious. Many people, including Amrutaben Kalidas Parmar (PW 3, Ex.14) a neighbour of the deceased, gathered there. The complainant Jayeshbhai, Amrutaben and other persons took the deceased to a private hospital of Dr.Dholakia. The complainant thereafter went to the residence of the deceased and informed his parents. The deceased then was removed to the Civil Hospital, Gandhinagar where primary treatment was given to him. At the instance of the doctor, the deceased was thereafter taken to the Civil Hospital, Ahmedabad where he succumbed to the injuries. The complainant on the next day but on the same night gave his complaint, Ex.47, to Gandhinagar Police Station.

Pravinchandra Chhatrasinh Raol, (PW 16, Ex.46), Police Inspector, Gandhinagar Police Station, after carrying out usual investigation, submitted a chargesheet against the appellant for the offence punishable under Section 302 of the Indian Penal Code. The learned

Additional Sessions Judge framed charge, Ex.7, or the alleged offence punishable under Section 302 IPC to which the appellant pleaded not guilty and claimed to be tried. The learned Additional Sessions Judge at the end of the trial, after considering the evidence on record, including the further statement of the appellant recorded under Section 313 of the Criminal Procedure Code and the evidence of Dr. Tushar Shah examined by the defence at Ex.53, came to the conclusion that the prosecution has established the charge against the appellant and he therefore by his impugned judgment and order convicted and sentenced the appellant for the offence punishable under Section 302 IPC and sentenced him as stated above. It is this judgment and order of conviction and sentence which is challenged in the present appeal.

Mr. Jayant M.Panchal, learned Advocate appearing for the appellant, has taken us through the evidence of the material prosecution witnesses and broadly submitted that the learned Additional Sessions Judge has committed an error in convicting the appellant under Section 302 IPC. In the submission of Mr. Panchal, the incident in question had taken place in the shopping centre of the busy locality of Gandhinagar town and surprisingly not a single witness is examined by the prosecution and, therefore, no conviction can be based on the sole testimony of the eye witness Jayeshbhai Parmar who was the friend of the deceased and therefore an interested witness. Mr. Panchal has criticised the evidence of the complainant on the ground that he being an interested witness, his evidence is unreliable. Mr. Panchal has further contended that even though the police chowky was in the vicinity of the shopping centre, no attempt was made by the complainant to inform the police and the complaint was filed on the next day. In the submission of Mr. Panchal the prosecution has not explained the delay in filing the complaint and, therefore, the benefit must go to the accused-appellant. Finally Mr. Panchal submitted that in absence of the independent and reliable evidence about the genesis of the incident and in view of the fact that grappling had taken place between the appellant and the deceased and the deceased was already doing hair cutting with the scissor in his hand, the injury on the chest of the deceased was accidental and, therefore, no case is made out against the appellant under Section 302 IPC.

Mr. M.A.Bukhari, learned Additional Public Prosecutor on the other hand submitted that the evidence of the complainant Jayeshbhai is natural and believable and no corroboration is necessary. Mr. Bukhari pointed

out that in view of the injuries sustained by the deceased, only possible conclusion is the commission of the murder by the appellant and, therefore, no interference is necessary.

Before we consider the evidence of the complainant, let us examine the medical evidence first. Dr. Ravindra B. Deshmukh, (PW 13, Ex.40), who performed the post mortem examination of the deceased found the following external injuries on the person of the deceased:

- 1 Bruise present on mid of front part of right arm verticle, red size 4 x 2 cm.
- 2 Abrasion over the lower part of front of right arm just above the elbow size 1 x 2 cm covered with dry clotted blood ban is red.
- 3 A stab wound is present over left side of front of chest from mid line over the 6th interpostal space, horizontal margins and angles are bruise and wide, size 1.5 x 1 cm angles are about 082 to 083 cm wide covered with dry clotted blood margins inverted. The track of the wound is leading in to the left pleural cavity.

According to the doctor, these injuries were antemortem inorgion. Dr. Deshmukh also found the following internal injuries on the person of the deceased:

- 1 The tip of the stab wound ext.inj No.3 is situated into the loose tissue at behind the heart . The track of the wound has passed through the skin muscles of chest and 6th interpostal space pleaura of left side and then perforated the paricardium anteriorly. It then has pierced the anterior wall of right verticle of heart of a point 1'5 cm above and right to the apex of heart entered into the cavity of right vantricle. It then has perforated the intervantriculated reptum and entered into the cavity of left ventricle of heart, and thereafter it passed through its posterior wall and pericardium at back of heart clots and blood about 2000 c.c. are present in left pleural cavity and pericardium track converages towards its tip. The raise is the different structures is contused left lung is collapsed.

Depth about 14 cm. Direction backwards upwards and medially.

In view of the injuries, the doctor has stated that the cause of death was due to shock and haemorrhage as a result of the stab injury to the heart and the stab injury was caused by pointed sharp penetrating object. The death had occurred within 24 hours of the post mortem examination. In view of the medical evidence, the deceased died a homicidal death. According to Dr.Deshmukh injuries Nos.1 and 2 are possible due to fall. In the cross-examination the doctor has denied that injuries Nos. 1 and 2 are possible due to grappling. However, he has admitted that the injuries Nos.1 and 2 are possible due to fall or when the body comes in contact with any hard and blunt substance. The doctor has specifically denied the suggestion that even in the event of grappling between the deceased and the appellant and with the scissor in the hand of the appellant, if a push is given by the deceased, in that event external injury No.3 and internal injury No.1 is possible. The doctor has further denied the suggestion that the manner in which injury No.3 has taken place on the person of the deceased, it is possible by accident. In the opinion of the doctor a stab wound of 40 cm deep on the chest is possible with the muddamal scissor. In reply to the question put by the Court, the doctor has replied that external injury No.3 corresponding to internal injury No.1 is possible only when force is used. In view of the medical evidence on record, it is clear that the deceased died due to stab injury in the chest sustained by him and that such an injury is possible by a sharp penetrating instrument like muddamal scissor. It is also clear that the scissor was used by applying force. The doctor has in no uncertain terms ruled out the possibility of death by accident.

Dr. Tushar Shah , (DW 1,Ex.53), who has been examined by the defence has also more or less given the same opinion. Dr. Tushar Shah is a Surgeon having brilliant academic career inasmuch as he is M.S. and was the first in Gujarat to perform open heart surgery in 1984. In his evidence he has stated that in no uncertain terms that injury No.1 corresponding to internal injury No.1 is possible by muddamal scissor. Of course, Dr. Shah has agreed with the suggestion of the defence that if someone falls on the verticle broken glass, the said broken glass can pierce the heart and the same may prove fatal. Similarly if some holds the scissor in his hand and some one is dashed against it or comes in contact with the same, it can penetrate the body and the injury is possible. Against all these suggestions, Dr. Shah has admitted in no uncertain terms that external injury No.3 corresponding to internal injury No.1 is possible,

if the weapon is used with force. In our opinion even though Dr. Tushar Shah has been examined as a defence witness, the evidence of Dr. Shah on the contrary corroborates the version given by Dr. Deshmukh. It is pertinent to note that the appellant in his further statement has admitted the presence of the deceased as well as the complainant Jayeshbhai in his shop on the day in question. According to the appellant, the deceased and the complainant came to the shop when he was cutting hair of another customer. The deceased initiated quarrel by making a grievance that on the previous occasion the appellant had not cut his hair properly and to that the appellant informed that if they are not interested in getting their hair cut by him they can go to some other shop. The deceased on hearing this got excited and entered the shop and there was exchange of words between him and the complainant. The appellant told that this being peak hours of business for him and, therefore he requested not to tease him. In spite of that both of them assaulted by fist blows on his face and scuffle had taken place between the appellant and the deceased. At that time he did not know when the scissor hit the deceased. According to him when the deceased fell down on the ground, the complainant shouted that the deceased is shivering. Thereafter the complainant took the deceased out of shop, however, the appellant continued cutting hairs. Reading the statement of the appellant, it is clear to us that, as stated above, the appellant does not dispute the presence of the complainant and the deceased in his shop. However, the quarrel started at the instance of the deceased and because of grappling and scuffle the scissor was hit to the deceased. However, in view of the medical evidence on record, it is not possible for us to hold that the deceased died because of the injuries sustained by him by accident. In view of the admission of the appellant regarding the presence of the complainant Jayeshbhai at the time of the incident, we have to accept the evidence of the complainant. Suffice it to say that the complainant's evidence has totally supported the prosecution case. The complainant in his evidence has clearly stated that when the incident had taken place the appellant was cutting hair of other customer and initially altercations of words took place and because of the same a tense situation was created and suddenly the appellant inflicted a scissor blow. According to the complainant when the altercation was going on between the deceased and the appellant, he intervened and tried to pacify them. However, both continued the heated exchange of words. Thereafter grappling took place between them which continued for about two minutes and at that time the appellant

inflicted scissor blow. Even he tried to separate them. It is true that in view of the admission of the complainant that the deceased was a friend of the complainant, merely because the deceased being a friend of the complainant that fact by itself is no ground for rejecting his evidence branding him as an interested witness. Since his presence is admitted by the appellant in his further statement, we have to consider his evidence regarding the description of the incident which is totally corroborated by the medical evidence. It is true that the incident had taken place in the busy locality and, therefore, the prosecution could have produced some other independent witness. However, since it has come in the evidence that the appellant was in fact cutting hair of some third person and in his presence the incident had taken place, but having seen the record even his statement has also not been recorded by the Investigating Officer. In other words the concerned customer must have run away no sooner he witnessed the incident. In any case, by not bringing the said customer as an eye witness, in our opinion, would not be fatal to the prosecution case since the prosecution has placed reliance on the solitary eye witness in the form of the complainant. But this court finds the evidence of the complainant as reliable and trustworthy and the conclusion can be based relying on the testimony of the solitary witness. In any case, the evidence of the complainant, as stated above, is corroborated by the medical evidence. In our opinion therefore the involvement of the appellant in the incident is duly established.

The prosecution has examined Amrutaben, the neighbour of the deceased. However, since she came after the deceased fell down, her evidence will not be of much assistance to the prosecution. It is true that just near the shop of the appellant, there are inquiry office of the shopping centre and the police chowky. The complainant could have informed about the incident to the officer of the police chowky. The complainant in his evidence has stated that he did not realise that he is required to file a complaint immediately. However, the fact remains that the complainant did not lodge the complaint with the police station immediately. However, he lodged the complaint on the same night at about 3.00 a.m. before Gandhinagar Police Station. Thus, there was delay of some hours in filing the complaint. In our opinion the so-called delay will not come in the way of the prosecution as one is required to consider the anxiety on the part of the complainant to save the life of his friend and his mental condition too. Reading the

evidence of the complainant, it is clear that the complainant took the deceased in the company of Amrutaben and others to a private medical practitioner. Thereafter he went to the house of the deceased and informed his father and brought him to the hospital. Thereafter again he took the deceased in a rickshaw to Gandhinagar hospital where some time was taken in providing medical assistance to the deceased. However, the doctor thereafter advised to shift the deceased to Civil Hospital, Ahmedabad and accordingly the deceased was removed to Civil Hospital, Ahmedabad in Ambulance van where the deceased was declared dead. Thus, in view of the fact that the complainant had remained althroughout with the deceased, he was justified in filing the complaint late. In view of this discussion, we are convinced beyond any manner of doubt regarding the involvement of the appellant in the incident in question. Therefore, it is not possible for us to hold that the appellant is not responsible for causing the death of the deceased by holding that the death of the deceased was caused as a result of the accident. However, taking the over all view of the matter, we are also of the view that the appellant cannot be held guilty for committing the offence punishable under Section 302 of the Indian Penal Code. Even accepting the prosecution case as true, the surrounding circumstances, in our opinion, would clinch the issue in favour of the appellant. Admittedly the appellant was already engaged in cutting hair of a third customer when the deceased and the complainant came to his shop. Admittedly the deceased passed remarks against the appellant that on the previous occasion the appellant had not properly cut his hair to which the appellant replied that if they are not satisfied with his work, they may go to some other shop. It was at this time that the deceased got excited and entered the ship of the appellant and there was exchange of words between them. The appellant never anticipated the incident and, therefore, there was no pre-plan or premeditation nor was there any motive on the part of the appellant to commit murder of the deceased. It was only after the exchange of verbal altercations and thereafter grappling and scuffle between the appellant and the deceased which resulted into receiving injury by scissor which was held by the appellant since he was already cutting hair of a customer. It is not the say of the complainant that the deceased had picked up the scissor lying on the table by going inside the shop and caused stab injury to the deceased. Now once we believe the grappling, there is bound to be some movement and while in movement, aiming of scissor is not possible and, therefore, there cannot be any intention on the part of the appellant to inflict

a blow on the vital part of the body. Thus the fact that the injury was caused with the scissor on the vital part by itself is not a fact which would go to suggest that the appellant had caused the said injury with intention to cause murder of the deceased. Therefore, there are all possibilities that due to movement while grappling and scuffle, the appellant might have missed the aim on the non-vital part of the body and instead it was hit on the vital part of the body. Reading the charge framed against the appellant, it is further clear that the injury was on account of sudden fight and it was by a solitary blow and there was no further attempt to inflict second blow. Now these are the circumstances which, in our opinion, would completely destroy the conclusion arrived at by the learned Additional Sessions Judge for holding the appellant responsible for the offence under Section 302 IPC. The learned Additional Sessions Judge, in our opinion, has committed an error in convicting the appellant for the offence under Section 302 since he has not considered nor appreciated the aforesaid circumstances. In our opinion the appellant is therefore liable to be convicted and sentenced for the offence punishable under Section 304, Part II of the Indian Penal Code.

In the result, the appeal is partly allowed. The order of conviction under Section 302 IPC is converted into one under Section 304, Part II IPC and the appellant-accused is sentenced to suffer R.I. for the period already undergone. Therefore, the appellant is ordered to be released forthwith if not required in connection with any other offence.

Writ of this order for service to the jail authority is permitted to be given to the father of the appellant.

Verified Copy